



Commonwealth of Massachusetts State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-727-0060, fax: 617-723-5851



SUFFOLK, ss.

COMMISSION ADJUDICATORY
DOCKET NO. 676

IN THE MATTER
OF
FRANCIS H. DUBAY

DISPOSITION AGREEMENT

The State Ethics Commission and Francis H. Dubay enter into this Disposition Agreement pursuant to Section 5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented-to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, §4(j).

On October 23, 2002, pursuant to G.L. c. 268B, § 4(a), the Commission initiated a preliminary inquiry into possible violations of the conflict-of-interest law, G.L. c. 268A, by Dubay. The Commission has concluded its inquiry and, on February 5, 2003, found reasonable cause to believe that Dubay violated G.L. c. 268A, §§19 and 20.

The Commission and Dubay now agree to the following findings of fact and conclusions of law:

Findings of Fact

1. During the time relevant, Dubay was an Erving selectman, having been elected to that position in May 2002. As such, Dubay was a municipal employee as that term is defined in G.L. c. 268A, § 1(g).

2. The population of Erving is less than 2,000, making the Erving selectmen special municipal employees for purposes of the conflict-of-interest law, as that term is defined in G.L. c. 268A, § 1(n).

3. In spring 2002, the newly elected town treasurer was in need of an assistant treasurer. She approached Dubay and asked if he were interested in the position. The position paid approximately \$12 per hour and required a commitment of at least ten hours per week.

4. On May 15, 2002, Dubay called the Ethics Commission for advice on whether he could hold a part-time paid, appointed position under the elected town treasurer when he was also a selectman. He was told that he would be in compliance with the conflict-of-interest law if he filed a written disclosure of the situation with the town clerk,

and had the selectmen vote to approve his holding the part-time paid position while also being a selectman. Dubay did not ask whether he could participate in the vote on his own appointment.

5. On June 10, 2002, the selectmen, including Dubay, discussed whether to appoint Dubay as the assistant treasurer. Dubay seconded the motion to appoint himself to the position and voted in favor of the motion, which carried 2-1.

6. At the time of the vote, the dissenting selectman, who had been on the board longer than Dubay, stated that Dubay might have a problem with the Ethics Commission for voting on his own appointment. Dubay heard but did nothing in response to this statement.

7. Dubay's participation in the vote appears to have been determinative because only one of the other two selectmen voted to approve Dubay's appointment to the position. Thus, if Dubay had not cast the deciding vote, he would not have been appointed to the position.

8. Despite having received advice from this Commission on how to comply with the conflict-of-interest law regarding holding two town positions, Dubay did not follow that advice. He failed to file a disclosure with the town clerk, and the selectmen never voted to approve the exemption of his financial interest in the assistant treasurer position from the conflict-of-interest law restrictions.

Conclusions of Law

9. Section 19 of G.L. c. 268A prohibits a municipal employee from participating¹ as such an employee in a particular matter² in which, to his knowledge, he has a financial interest.³

10. The board of selectmen's decision to appoint Dubay as the assistant treasurer was a particular matter.

¹ "Participate" means to participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, ¶(j).

² "Particular matter" means any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, ¶(k).

³ "Financial interest" means any economic interest of a particular individual that is not shared with a substantial segment of the population of the municipality. See *Graham v. McGrail*, 370 Mass. 133 (1976). This definition has embraced private interests, no matter how small, which are direct, immediate or reasonably foreseeable. See *EC-COI-84-98*. The interest can be affected in either a positive or negative way. *EC-COI-84-96*.

11. As the assistant treasurer position was compensated, Dubai had a financial interest in the particular matter of his appointment to that position, and he knew of his financial interest.

12. Dubai participated in that particular matter as a selectman by discussing his own appointment, seconding the motion, and casting the deciding vote in favor of his appointment. He did so despite the concerns of a fellow selectman who had been on the board longer than Dubai.

13. Accordingly, by participating in the particular matter concerning his appointment as assistant treasurer, Dubai violated § 19.

14. Section 20 of G.L. c. 268A prohibits a municipal employee from having a financial interest, directly or indirectly, in a contract made by a municipal agency of the same city or town, in which the same city or town is an interested party of which financial interest the employee has knowledge or reason to know.

15. Section 20 prohibited Dubai, a municipal employee as a selectman, from holding the assistant treasurer position because his appointment as assistant treasurer was a contract made by the town in which the town had a direct and substantial interest, and in which Dubai knowingly had a financial interest.

16. As noted above, a special municipal employee may comply with this section of the conflict-of-interest law by filing with the town clerk a full disclosure of his financial interest, and by having the board of selectmen approve the exemption of his interest pursuant to § 20(d).

17. Dubai was a special municipal employee and could have complied with the § 20(d) exemption provision, but he failed to do so. Thus, Dubai violated § 20.

18. While a special municipal employee's failure to comply with the § 20(d) exemption provision (which requires the selectmen's vote of approval) may not seem like a serious violation in light of the selectmen's having voted to appoint him to the second position, the Commission views Dubai's violation as significant where Dubai was given advice prior to his appointment on his *need* to comply with § 20(d), but failed to so comply. In addition, to the extent that the selectmen's vote to appoint Dubai as the assistant treasurer might also be viewed as the approval of Dubai's exemption pursuant to § 20(d), it should be noted that this vote passed only because Dubai participated in and cast the deciding vote, in violation of § 19.

19. Dubai has since resigned his position as assistant treasurer.

20. Dubai fully cooperated with the Commission's investigation and resolution of this matter.

R e s o l u t i o n

In view of the foregoing violation of G.L. c. 268A by Dubay, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by Dubay:

- (1) that Dubay pay to the Commission the sum of \$1,000 as a civil penalty for violating G.L. c. 268A, §§ 19 and 20;⁴ and
- (2) that Dubay waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceedings to which the Commission is or may be a party.

DATE: March 18, 2003

⁴ The civil penalty reflects, in part, Dubay's failure to follow the § 20 advice that he received from this Commission in advance of his conduct, and his failure to heed a fellow selectman's warning.